TAINION CO. SDN. BHD.

v.

SUN SONG CONSTRUCTION SDN. BHD.

HIGH COURT, KUCHING
TUAN RICHARD MALANJUM J.
[SUIT NO. 147 OF 1989]
10 DECEMBER 1993

CONTRACT: Goods sold and delivered - Defendant holding back payments due to plaintiff on the grounds of delay in delivery and non-supply of certain goods - Whether defendant justified in withholding payment due to plaintiff - Defendant counter-claiming for losses suffered - Whether there were merits in the counter-claim.

The plaintiff sold and delivered steel bars of various descriptions (the Goods) to the defendant *vide* an agreement dated 4 January 1989. The defendant failed to pay for the goods and the plaintiff sued for the balance outstanding. The defendant claimed that the plaintiff had delayed in the supply of the goods, causing the defendant losses, and counter-claimed for damages.

Held:

[1] In view of the fact that the defendant had accepted delivery of the goods, inspite of the agreement allowing the defendant to get the supply elsewhere, and as the defendant did not return any of the goods when requested to do so by the plaintiff or its supplier, the defendant's reliance on the delay in the supply of the goods in withholding the balance due to the plaintiff was unjustifiable.

[2] Further, the defendant had acknowledged the sum due to the plaintiff and there was no convincing document or evidence to show that the defendant did not agree on the said sum.

[3] Although the defendant had complained that the goods were short-sized or rusty, PW2's evidence that when he requested for the return of the said goods, the defendant failed to return them and no explanation was given, shows that this complaint was without merit.

[4] The defendant's counter-claim was unsubstantiated and accordingly the defendant had failed to prove its counter-claim on the balance of probabilities.

[Plaintiff's claim allowed with costs to be taxed. Defendant's counter-claim dismissed].

Case referred to:

Syarikat Pakar Kayu dan Perniagaan Sdn. Bhd. v. Masak Sdn. Bhd. [1986] 1 CLJ 595 ***(refd)***

For the plaintiff - John Shek; M/s. John Shek & Co.
For the defendant - Ernest Chua, M/s. Ernest Chua & Co.

JUDGMENT

Richard Malanjum J:

Introduction

This is an action by the plaintiff against the defendant for goods sold and delivered, to wit, steel bars of various descriptions (thereinafter collectively referred to as "the goods"). The plaintiff prays for the following relief:

(a) the sum of RM119,020.10;
(b) interest thereon at the rate of 1.2% per month from 30 July 1989, till date of judgment and thereafter at 8% per annum till full settlement;
(c) costs; and
(d) any other order this Honourable Court deems fit and proper.

The undisputed facts:

It is not in dispute the existence of the following facts namely:

(i) that the plaintiff supplied the defendant the goods on various dates pursuant to an agreement dated 4 January 1989 (Ex. P1) which terms, *inter alia*, provided for the payment of interest at the rate of 1.2% per month on any amount unpaid after the expiry of the 45 days from the date of the delivery of the goods;
(ii) that the goods were accepted and used by the defendant;
(iii) that in the annual accounts of the defendant ending 31 July 1990 (Ex. D7) the sum of RM109,936.34 was included as being due to the plaintiff;
(iv) that the total value of goods supplied by the plaintiff was RM493,608.20 and the payments by the defendant added up to RM377,410.50;
(v) that the defendant is withholding a sum of RM113,538 as of 26 May 1989 whereas the plaintiff is claiming the sum of RM119,020.10 as of 30 July 1989.

The plaintiff's claim - The Issues:

Having considered the evidence adduced I am of the view that the only issue, leaving aside the

counter-claim, which requires consideration is whether the defendant is justified to withhold the payment to the plaintiff.

The plaintiff's version:

From the undisputed facts I am of the view that there is no doubt that the plaintiff did supply the goods to the defendant and after deducting the payments made by the defendant there is still a sum outstanding for the prices of the Goods.

In rebutting the justification for withholding the payment, Mr. Ong Seng Guan (PW1), the Managing Director of the plaintiff testified that the supplies of the goods were done in accordance with Ex. P1. As for the delay in the first supply it was his contention that the defendant requested it to be delayed as the site was not ready then. He further said that it was upon the insistence of the plaintiff to deliver the first supply as evident by Ex. P17 that the defendant finally agreed for the goods to be delivered. PW1 also testified that where some types of the goods were not available the plaintiff requested the defendant to buy them elsewhere and the plaintiff agreed to pay the difference in the prices.

With regard to payments by the defendant PW1 complained that they were slow and that the defendant made deductions in the prices even without his consent. PW1 said that payments were only made when the plaintiff refused to make any delivery of the goods. Further, credit notes were given by the plaintiff after the defendant had assured of full payments but which did not happen. PW1 also referred to page 22 of "A" (Agreed Bundle of Documents) which is a document pertaining to a confirmation of debt issued by the defendant to the plaintiff. In it the defendant requested the plaintiff to confirm the sum of RM109,936.34 but the plaintiff did not do so as it disputed the figure.

Under cross-examination PW1 explained that though it appeared that he only placed orders to the suppliers a few days before the due date of delivery to the defendant it was the defendant who delayed in taking delivery. Moreover the orders placed by the plaintiff were not necessarily for the defendant as the plaintiff had constant orders made to its suppliers. PW1 also said that when the defendant made alteration to Ex. P12 which is a credit note No. 3181 dated 3 May 1989, he asked for the return of the goods but the defendant refused. He further said that a statement of accounts was delivered to the defendant prior to this action.

The plaintiff also called Murni Haji Mat (PW2). This witness confirmed that the plaintiff placed orders for the goods on 5 January 1989 and on 24 February 1989 from PCMS Sdn. Bhd. Subsequently the supplier had to request the plaintiff to take delivery within March 1989 otherwise the price would be increased (Ex. P18). PW2 also testified that he asked the defendant to return the goods which were undersized and rusty but none was returned.

The defendant's version:

For the defendant Mr. Wee Song Ching, (DW1), the Managing Director of the defendant testified that the plaintiff did not supply the goods in accordance with Ex. P1. He said that if the goods were not delivered by 1 March 1989 then the defendant could not carry out its works. He further said that there was also no explanation given for the delay in the supply of the first batch of the goods.

On 21 April 1989 DW1 said that he wrote to the plaintiff to extend the time to supply the goods (Ex. D4). Subsequently he said that reminders were sent to the plaintiff to supply but it still failed to do so. By a letter dated 26 May 1989 (pages 7 to 9 of "A") DW1 said that it explained why the payment to the plaintiff was withheld. He further denied receiving any statement of accounts from the plaintiff. As regards the confirmation of debt (page 22 of "A") DW1 left it to the accountant of the defendant who prepared it according to the bills of the plaintiff. He said that the defendant did not owe anything to the plaintiff. On the annual return of the defendant ending 31 July 1990 (Ex. D7) the sum stated in the document at page 22 of "A" was included therein. DW1's explanation for that was the same as for page 22 of "A". He also said that it was only orally explained to the auditor about the letters written to the plaintiff and no adjustments were made subsequently due to this present action. But this witness admitted that the goods supplied had been used by the defendant.

Under cross-examination DW1 disagreed that based on the documents Ex. P2 to Ex. P5 the amount of goods supplied was RM400,000. He said that he only agreed on the delivery orders and not the invoices.

When shown some documents as for example Ex. P4, DW1 agreed that his signature appeared therein but said that he also complained orally to the plaintiff. DW1 also went on denying the value of the goods supplied on 3 April 1989. Further, he refused to answer a question pertaining to the obligation of the defendant to pay within 30-45 days after delivery of the goods on the ground that the plaintiff did not supply the goods within the specified time and that the defendant allowed the plaintiff to store the goods in the former's store.

Finding of the Court:

On close examination of the evidence adduced both oral and documentary and having considered the demeanour of the witnesses from both sides I am inclined to think that the main excuse tendered by the defendant for not paying is on the ground of delay and to a certain extent on non-supply resulting in the alleged losses. But I do not think that the ground is justified for the following reasons:

(a) if the delay was such a fatal event I find no reason why the defendant proceeded to accept the delivery of the goods on 21 March 1989. After all Ex. P1 allowed the defendant to get the supply elsewhere and the plaintiff had to pay the price differences. In fact it was beyond dispute that all the goods supplied had been taken by the defendant as none was returned when requested by the plaintiff or its supplier, PCMS Sdn. Bhd.;

(b) the defendant had also acknowledged the sum due to the plaintiff as shown on page 22 of "A" and Ex. D7. I cannot accept the explanation of DW1 for the inclusion of the said sum into those documents. There is no convincing document to shown that the defendant did not agree on the sum due to the plaintiff. Having seen DW1 in the witness box I doubt very much on the veracity of the reason given. (See: *Syarikat Pakar Kayu dan Perniagaan Sdn. Bhd. v. Maask Sdn. Bhd.* [1986] 1 CLJ 595);

(c) the plaintiff had adduced evidence indicating that the defendant had been difficult to deal with. This attitude was obvious as when the plaintiff withheld supplies or agreed to issue credit notes the defendant would make some payments.

(d) I also find DW1 not being entirely honest with the whole transaction. He said that the goods supplied were short-sized or rusty. But PW2 testified that when he requested for the return of the goods the defendant did not do so and no explanation was given.

For the above reasons it is my finding that the plaintiff has proved its claim against the defendant on the balance of probabilities.

The counter-claim:

The defendant made a counter-claim praying for the following:

(i) the sum of RM395,534.42;
(ii) interest thereon at the rate of 8% per annum from the date of judgment until full and final payment;
(iii) damages for breach of contract;
(iv) costs; and
(v) such other reliefs as the Honourable Court deems fit and expedient.

The breakdown of the sum counter-claimed is as follows:

(a) RM59,085.94 being the amount overpaid to the plaintiff as per the plaintiff's Bills Nos. 3165, 3169 3181 and 3197;
(b) a sum of RM180,600 being 70% of the loss of two months' rentals for plants and machineries hired by the defendant;
(c) a sum of RM26,600 being 70% of the loss of two months' wages for site and office staff;
(d) a sum of RM120,000 being the liquidated and ascertained damages payable to JKR;
(e) a sum of RM9,248.48 being two months' interest at 10.5% per month on JKR's retention sum of (RM528,484.40).

I shall deal with each item above.

On item (a) the evidence adduced by the defendant to substantiate its claim are the following exhibits, namely, Ex. P4, Ex. P6, Ex. P12 and page 18 of "A". These are credit invoices. Having perused them and after considering page 22 of "A" and Ex. D7 I find no merit in this claim. If the defendant was serious about this claim then surely documents to that effect would have been produced and that page 22 of "A" and Ex. D7 would have been the best opportunity to indicate such a stand. Nothing came near to that in this case.

For item (b) much reliance had been placed on Ex. D5 in support. But Ex. D5 on its own indicates nothing. No evidence was adduced

that in fact such expenses were indeed incurred. Moreover, DW1 agreed that he was and is a partner in the Song Construction Company. Ex. D7 also states that the two are related companies. Looking at the address as well I have my doubt if the defendant and that company are in genuine deal on this matter. Further no reason was forwarded on the limit of the claim being put up at 70%. I am not therefore satisfied that the defendant has proved its claim under this item on the balance of probabilities.

As for item (c) the defendant only produced payment vouchers and alleging that the payments were incurred due to the delay in supply on the part of the plaintiff. However aside from just producing the payment vouchers no evidence was adduced that the defendant paid these wages for nothing in return from its workers. And how the defendant based its claim on 70% is also unsubstantiated. Accordingly on this item I find the defendant has not proved it on the balance of probabilities.

On the claim for liquidated and ascertained damages payable to Jabatan Kerja Raya under item (d) and item (e) which is on the interest on the retention sum, I find no merit in them. DW1 testified that no actual payment was made to the Jabatan Kerja Raya and nothing was said on the interest claim on the retention sum. As such the defendant has not proved this claim on the balance of probabilities.

Orders

I grant therefore the claim of the plaintiff as follows:

(i) the sum of RM119,020.10;
(ii) interest thereon at the rate of 1.2% per month from 30 July 1989 to the date of judgment and thereafter at the rate of 8% per annum until full settlement; and
(iii) costs to be taxed.

As for the counter-claim of the defendant I hereby dismiss it.